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Article

The Preventive Paradigm and the Perils of Ad Hoc Balancing

Jules Lobel[†]

The Bush administration's response to the September 11 attacks has been characterized by a paradigm shift in fighting terrorism: from a defensive to offensive strategy, from reliance on deterrence to a new emphasis on preemption, from backward to forward-looking measures, and from prosecution to prevention.¹ At the heart of this shift is what Attorney General John Ashcroft termed the "new . . . paradigm of prevention."² The Bush administration has invoked this sweeping new preventive paradigm to justify the coercive use of state power to preventively detain suspected terrorists, to engage in extraordinary rendition of suspects to foreign states, to interrogate detainees, and to go to war against Iraq.³ While the traditional rules of both international and domestic law prevent a state from using physical force against an individual or another nation except in response to some demonstrable wrongdoing, the

[†] Professor of Law, University of Pittsburgh Law School. This Article draws upon a larger book project, co-authored with Professor David Cole, entitled *Less Safe, Less Free: The Failure of Preemption in the War on Terror* (forthcoming New Press 2007). Any mistakes or errors are, of course, my own, as are any views expressed in this Article. I wish to thank my research assistant Sarah Vuong for her research help with this Article and the staff of the Document Technology Center at the University of Pittsburgh for their invaluable assistance in preparing this Article. Copyright © 2007 by Jules Lobel.

1. DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: THE FAILURE OF PREEMPTION IN THE WAR ON TERROR* (forthcoming New Press 2007) (manuscript at 1, on file with authors).

2. John Ashcroft, U.S. Attorney Gen., Prepared Remarks Before the Council on Foreign Relations (Feb. 10, 2003), *available at* <http://www.usdoj.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm> ("In order to fight and to defeat terrorism, the Department of Justice has added a new paradigm to that of prosecution—a paradigm of *prevention*.").

3. *See infra* Part I.

new preventive paradigm allows the state to use such coercive power to prevent possible wrongdoing in the future.⁴

The shift to prevention has shaped the administration's response to terrorism in a wide variety of domestic and international contexts. Domestically, the Justice Department now views the prevention of future terrorist acts as "even 'more important than prosecution' [of] past crimes."⁵ Similarly, in foreign policy, the *National Security Strategy* announced a "new doctrine called preemption,"⁶ which states that we are living in a "new world"⁷ where the U.S. "can no longer solely rely on a reactive posture as . . . in the past."⁸ The *National Security Strategy* maintained that in order to prevent a future attack, the United States could initiate warfare unilaterally even when it neither had been attacked nor faced a threat of imminent attack.⁹ In the name of preventing future attacks, the administration detained thousands of individuals without trial, the vast majority of whom were never even charged with committing a terrorist crime.¹⁰ The administration has justified its use of coercive interrogation tactics against detainees and its establishment of secret CIA prisons, which house allegedly high-value al Qaeda suspects, by asserting the necessity of preventing future terrorist attacks.¹¹ The administration has transformed the practice of extraordinary rendition from a mechanism used to transfer accused criminals to a country where they would face trial to a preventive technique whereby suspects are sent to third countries not to try them for crimes they allegedly committed, but to torture and preventively detain them without charge in order to obtain information to prevent future crimes.¹²

4. COLE & LOBEL, *supra* note 1 (manuscript at 5).

5. ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 3 (2006) (quoting Curt Anderson, *Ashcroft Cites "Monumental Progress" in U.S. War on Terrorism*, ASSOCIATED PRESS, Feb. 13, 2003).

6. Remarks at a Reception for Governor Rick Perry of Texas in Houston, 1 PUB. PAPERS 990, 994 (June 14, 2002).

7. George W. Bush, *Introduction* to WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002) [hereinafter NATIONAL SECURITY STRATEGY].

8. *Id.* at 15.

9. *Id.*

10. David Cole, *Are We Safer?*, N.Y. REV. BOOKS, Mar. 9, 2006, at 15, 17.

11. *Id.*

12. See Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, § 1, at 1 ("[Rendition is the] Bush administration's secret program to transfer suspected terrorists to for-

The adoption of this preventive model in both domestic and foreign affairs is closely linked to the President's assertion of inherent executive power and to the executive branch's reliance on military force and war powers to fight its war on terror. Critics of the Bush administration have argued that the administration has asserted unprecedented views of unchecked, inherent executive authority to fight terrorism, and these critics have claimed that the expansion of executive power underlies the war on terror.¹³ Few, however, have noted the close relationship between the administration's expansive view of executive power and its adoption of a coercive preventive paradigm. Yet, the Bush administration justifies its assertion of sweeping executive authority by claiming the need to use coercive preventive strategies. Indeed, immediately after September 11, top White House lawyers agreed "that [the administration] had to move from retribution and punishment to preemption and prevention. Only a warfare model allows that approach."¹⁴

The turn toward prevention is not surprising. When faced with potential terrorist threats, it makes sense to focus efforts on preventing future attacks, as opposed to merely punishing those who have attacked the United States. Preventive diplomatic, law enforcement, and security measures are crucial to U.S. security, just as preventive medicine is important to one's physical wellbeing. What is problematic about the administration's preventive paradigm is not its preventive focus, but the state's reliance on the preventive use of physical force against individuals or nations in circumstances where traditional law normally prohibits such use. Instead of focusing on preventive measures like increased port security or monitoring terrorist funding, both of which have been underfunded by this administration,¹⁵ the executive has emphasized coercive prevention. In pursuit of this aim, the administration has deployed physical and military force to detain suspected terrorists, to kidnap and send individuals to nations that will detain and likely torture them, to engage in coercive interrogations, and to go to war

eign countries for interrogation . . .").

13. See, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 554 (2004).

14. Jane Mayer, *The Hidden Power*, *NEW YORKER*, July 3, 2006, at 44, 51 (quoting Associate White House Counsel Bradford Berenson).

15. Mathew Brzezinski, *Red Alert*, *MOTHER JONES*, Sept.–Oct. 2004, at 39, 94.

against nations that it believes pose a future threat.¹⁶ Of course, a state may use force against individuals or other nations in circumstances narrowly prescribed by the rule of law.¹⁷ A function of the preventive paradigm is to nullify those proscriptions in the name of prevention.

The preventive paradigm was making disturbing inroads into traditional notions of preventing harmful conduct even prior to September 11. Some scholars have argued that democratic societies are experiencing a basic shift in their approach to controlling harmful behavior, moving from a traditional reliance on deterrence and backward-looking reactions toward a more preventive and forward-looking approach.¹⁸ Professor Paul Robinson has observed that over the past few decades, the criminal justice system's focus has shifted from punishing past violations to preventing future crimes by means of a system of preventive detention.¹⁹ Americans' increased fear of crime has made the criminal justice system more receptive to the preventive rationale.²⁰ September 11 dramatically escalated Americans' fears and insecurities, leading to greater acceptance of the preventive rationale in the war on terror.

The Bush administration's argument for the adoption of a new preventive paradigm is based on the threat of a potentially catastrophic attack.²¹ In a variety of settings, the administration and its supporters pose worst-case hypotheticals to justify highly coercive preventive measures. For example, they often invoke the ticking bomb scenario to justify preventive torture; they argue that if a suspect is known to have planted a bomb in a building, the only way to prevent thousands of people being killed is to torture the suspect. So too, in the run up to the preventive war against Iraq, President Bush invoked the specter of nuclear attack: "America must not ignore the threat gathering against us. Facing clear evidence of peril, we cannot wait for the final proof, the smoking gun, that could come in the form of

16. See *infra* Part I.

17. U.N. Charter arts. 39, 41, 42, 51.

18. DERSHOWITZ, *supra* note 5, at 2.

19. Paul Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detentions as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001).

20. See *id.* at 1433–34 (“[P]olitical forces inevitably will press for protective measures if a perception of public vulnerability exists [I]t is understandable that today's citizens are demanding greater protection and that legislators are seeking new ways to provide it.”).

21. NATIONAL SECURITY STRATEGY, *supra* note 7, at 13.

a mushroom cloud.”²² And when administration supporters argue in favor of preventive detention, they ask what the government should do when it captures a person known to be planning a terrorist attack when that knowledge is based on solid, reliable evidence that cannot be disclosed.

The preventive paradigm is thus premised on an emergency situation which purportedly requires modifying or discarding the normal rules of law. These preventive measures are grounded in a claim that when the potential risks are catastrophic the normal cost-benefit calculations of law do not apply.²³ Hence, while in ordinary times society generally accepts that it is preferable to let ten guilty persons go free than to convict one innocent person, some suggest that we cannot sustain that balance when the risk is that one of the ten who go free will get his hands on a weapon of mass destruction.²⁴

Preventive paradigm advocates therefore suggest replacing the clear rules of law applicable in normal times with a more ad hoc balancing approach attuned to the exigencies of emergencies, in which officials may undertake preventive action when such action is deemed the “lesser evil” because it is necessary to avoid catastrophic harm.²⁵ As Professor Ruth Wedgwood stated:

We tolerate multiple acts of individual and social violence as the cost of safeguarding our privacy and liberty, demanding that the government meet an extraordinary standard of proof before it can claim any power over our person, acting with a retrospective rather than anticipatory glance. But now the stakes seem different. . . . The deliberate temperance and incompleteness of criminal law enforcement seem inadequate to the emergency, when the threat to innocent life was multiplied by orders of magnitude.²⁶

Resorting to coercive preventive measures when threatened with an emergency of potentially catastrophic proportion is not, of course, confined to the current Bush administration. The United States has often turned to preventive measures in times of war or national emergency. The post-World War I

22. Address to the Nation on Iraq from Cincinnati, Ohio, 2 PUB. PAPERS 1751, 1754, (Oct. 7, 2002).

23. See *infra* text accompanying notes 25–34.

24. See *infra* text accompanying notes 25–26.

25. See, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 34 (2006); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 751–61 (2004).

26. Ruth Wedgwood, *The Law's Response to September 11*, 16 ETHICS & INT'L AFF. J. 8, 9 (2002).

Palmer raids and the World War II internment of over 100,000 Japanese Americans are two of the more infamous twentieth century examples of governmental deployment of coercive preventive measures in perceived times of crisis.²⁷ The country's first war with a European power after the Constitution's ratification, the undeclared war with France in the late 1790s, led Congress to enact the Alien and Sedition Acts of 1798 authorizing the President to deport aliens who had not committed any crime but were judged to be "dangerous to the peace and safety of the United States."²⁸ Some historians have characterized southern secession and the attack on Fort Sumter, which brought on the Civil War, as forceful preventive measures taken to forestall the Northern Republicans gathering threat to the system of slavery.²⁹ Other nations such as Great Britain,³⁰ Israel,³¹ and India³² have a long history of using preventive detention in response to a perceived crisis. Preventive war in response to a looming crisis has a long and generally sordid history in Europe.³³

Perceived emergencies are thus likely to provoke coercive preventive responses. Because preventive measures are so closely linked to emergencies, there is an inherent tension between such measures and the rule of law. Countries undertake these preventive measures because of perceived necessity, and as Oliver Cromwell once pithily put it, "Necessity hath no

27. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989–97 (2002).

28. Alien Friends Act, ch. 58, § 1, 1 Stat. 570, 570–71 (1798) (expired 1800) ("[I]t shall be lawful for the President of the United States at any time during the continuance of this act, to order all such *aliens* as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States . . ."); see also Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–24 (2000)); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

29. James M. McPherson, *The Fruits of Preventive War*, PERSPECTIVES, May 2003, at 5, 5.

30. Cornelius P. Cotter, *Emergency Detention in Wartime: The British Experience*, 6 STAN. L. REV. 238, 238 (1954).

31. AMNESTY INT'L, ISRAEL AND THE OCCUPIED TERRITORIES: ADMINISTRATIVE DETENTION: DESPAIR, UNCERTAINTY AND LACK OF DUE PROCESS 2 (1997), available at [http://web.amnesty.org/library/pdf/MDE150031997ENGLISH/\\$File/MDE1500397.pdf](http://web.amnesty.org/library/pdf/MDE150031997ENGLISH/$File/MDE1500397.pdf); Alan Dershowitz, *Preventive Detention of Citizens During a National Emergency—A Comparison Between Israel and the United States*, 1 ISR. Y.B. HUM. RTS. 295, 309 (1971).

32. Benjamin N. Schoenfeld, *Emergency Rule in India*, 36 PAC. AFF. 221, 225 (1963).

33. See COLE & LOBEL, *supra* note 1 (manuscript at 189).

law.”³⁴ The coercive preventive paradigm substitutes ad hoc balancing for the relatively clear rules designed to limit executive discretion.

This Article will address the claim that times of crisis require jettisoning legal rules in favor of ad hoc balancing. Part I will demonstrate that the coercive preventive measures adopted by the Bush administration discard clear legal rules in favor of ad hoc balancing and rely on suspicions rather than objective evidence. Part II will examine the claims of prevention paradigm supporters that ad hoc balancing is necessary in the new post-9/11 era in order to reach decisions that correctly weigh the values of liberty and peace versus national security. This Article will argue that discarding the legal rules that prevent or limit the application of coercive preventive measures in favor of an ad hoc balancing test not only undermines law and liberty, but fails to protect our security.

I. COERCIVE PREVENTIVE MEASURES, THE RULE OF LAW, AND AD HOC BALANCING

The constellation of tactics that form a core of the administration’s new preventive paradigm—detaining individuals who are believed to pose dangerous threats, rendering suspects to third countries where they are likely to be indefinitely detained and tortured, engaging in “preventive” torture or inhumane treatment in order to obtain information to prevent future terrorist actions, and initiating war to prevent a nation from eventually either attacking us or transferring weapons to terrorists who will use them against us—all have common elements. Each substitutes ad hoc balancing for clear rules, makes judgments based on suspicions and not hard evidence, and discards legal checks on unilateral decision making. These elements sacrifice integral components of what democratic nations have come to accept as the rule of law in the name of national security.

A. SUBSTITUTING OPEN-ENDED STANDARDS FOR CLEAR RULES

Democratic societies have sought to restrain the use of state violence against fundamental human interests by means

34. Max Radin, *Martial Law and the State of Siege*, 30 CAL. L. REV. 634, 640 (1942) (quoting Oliver Cromwell, Speech to Parliament (Sept. 12, 1654), in 5 THOMAS CARLYLE, OLIVER CROMWELL’S LETTERS AND SPEECHES WITH ELUCIDATIONS 74 (1870)).

of clear, bright-line rules. The government may not incarcerate a person for violating vague rules, nor can it deny her freedom of speech based on an open-ended ad hoc balancing test. The prohibition on torture and cruel and inhumane treatment is absolute.³⁵ International law has also sought to protect international peace and national self-determination by setting forth a bright-line rule against non-defensive use of force.³⁶

The preventive paradigm favors open-ended standards and ad hoc balancing over clear rules. When the government acts preventively it requires flexibility and discretion, and it seeks to avoid being hemmed in by clear strictures. Moreover, government actions that are based on predictions or suspicions about future conduct are inherently less subject to clear rules than those based on evidence of what has already occurred.³⁷ Since the government asserts that coercive preventive action is required by necessity, the typical formula weighs the magnitude of the harm the government seeks to avoid versus the probability that the government's action will avoid such harm—both of which are imponderables undefined by any clear rule.³⁸

For some, the essence of law is rules. To Justice Scalia, “a government of laws means a government of rules,” and a decision “ungoverned by rule” is “hence ungoverned by law.”³⁹ To be sure, despite Scalia's formulation, the law frequently employs open-ended balancing tests and speculative cost-benefit assessments. Courts or governmental agencies frequently utilize cost-benefit analyses to determine which acts constitute negligence or how stringent environmental and occupational safety regulations should be.⁴⁰ And the Supreme Court has often relied on balancing tests to resolve issues such as the validity of state laws that impinge on interstate commerce.⁴¹ But such decisions are fundamentally different from decisions to attack another nation, to incarcerate an individual indefinitely, or to employ coercive interrogation. Domestic and international law

35. See *infra* notes 42, 65 and accompanying text.

36. U.N. Charter arts. 39, 41, 42, 51.

37. See COLE & LOBEL, *supra* note 1 (manuscript at 5–6).

38. Yoo, *supra* note 25, at 751–61.

39. *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting).

40. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 107 (1983); *Thompson v. Hirano Tecseed Co.*, 456 F.3d 805, 809 (8th Cir. 2006); *Pennington v. Holiday Ret. Corp.*, 100 F. App'x 301, 302 (5th Cir. 2004).

41. *Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

recognize that the more fundamental the human interests at stake, the less appropriate are flexible, open-ended balancing tests. The prohibitions on torture, cruel and inhumane treatment, genocide, and summary executions are absolute.⁴² Similarly, because of the importance of the interests protected by the First Amendment, the Supreme Court has rejected a balancing approach for the regulation of subversive speech. In the 1950s, the Court had employed such a test, holding that the gravity of the threat of communist revolution was sufficiently great that even a small probability that it might come to fruition was sufficient to justify the punishment of speech advocating communism.⁴³ Ensuing abuse under that standard, however, ultimately led the Court to articulate a bright-line rule prohibiting the suppression of speech that advocates crime unless the state can demonstrate that the speaker intends to cause violence and that such violence is in fact likely and imminent.⁴⁴

The government's use of non-coercive preventive measures is typically a discretionary policy decision ungoverned by a clear rule. Whether to deploy new detection equipment at airports or seaports, how many visas to issue to foreign students, or whether to undertake diplomatic initiatives designed to make it more difficult for terrorists to obtain chemical or nuclear weapons are all determinations best left to political discretion. But when the state employs force against individuals or other nations, clear rules are an important legal mechanism to prevent abuses that inevitably arise from the exercise of discretion.

The tension between clear rules and coercive preventive strategies is illustrated by the preventive war doctrine articulated by the administration in its *National Security Strategy* and applied to justify the invasion of Iraq.⁴⁵ The terrible destructiveness of modern warfare led the world's leaders to conclude that individual nations' use of force should not be left to the political discretion of national leaders using vague balanc-

42. See International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221; Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, S. TREATY DOC. NO. 81-15, 78 U.N.T.S. 277.

43. *Dennis v. United States*, 341 U.S. 494, 501–11 (1951).

44. *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

45. See NATIONAL SECURITY STRATEGY, *supra* note 7, at 5–6.

ing tests.⁴⁶ These leaders concluded that they needed a clear rule to restrain the resort to war—a rule that prohibited nations’ use of force except in narrowly defined circumstances.⁴⁷ Just as legal protection for speech calls for bright-line rules limiting political discretion, the UN Charter articulates a clear rule that individual nations may not unilaterally decide to use force except in self-defense in response to an armed attack.⁴⁸ Customary international law broadens that self-defense exception somewhat to allow the use of force in response to imminent attacks.⁴⁹

The principle that individual nations may unilaterally use military force against other nations only in self-defense is designed to discourage resort to war by creating a bright-line legal rule. An armed attack is an objective fact; an imminent attack involves some amount of prediction, but generally requires objective evidence that the attack is indeed imminent, such as the massing of troops at the border. As Secretary of State Daniel Webster stated in 1842, self-defense is permitted under customary international law only where the threat is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”⁵⁰ The Pentagon’s definition of a permissible “preemptive attack” undertaken in self-defense echoed Webster’s: “an attack initiated on the basis of incontrovertible evidence that an enemy attack is *imminent*.”⁵¹

The new preventive war doctrine departs from this bright-line rule and substitutes a much more open-ended and less objectively verifiable standard. Not a single administration official argued that Iraq had plans of an imminent attack against the United States or anybody else. Rather, the administration’s claims were based on a calculation of inevitability or probability. For example, Deputy Secretary of State Richard Armitage

46. LOUIS HENKIN, *HOW NATIONS BEHAVE* 136–37 (2d ed. 1979).

47. *See id.*

48. U.N. Charter art. 51.

49. Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 518, 535 (2003).

50. Letter from Daniel Webster, U.S. Sec’y of State, to Alexander Baring, Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), in 2 JOHN BASSETT MOORE, *A DIGEST OF INTERNATIONAL LAW* 412, 412 (1906) (quoting Letter from Daniel Webster, U.S. Sec’y of State, to Henry Fox, British Minister in Wash. (Apr. 24, 1841)).

51. DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 418 (2007), available at <http://www.dtic.mil/doctrine/jel/doddict/data/p/04196.html>. (emphasis added).

asserted that rogue states' "unrelenting drive to possess weapons of mass destruction brings about the inevitability that they will be used against [the United States] or [United States] interests."⁵²

The decision to launch a preventive war invariably involves speculation about future events and intentions, which is a judgment that defies clear rules. Thus, the *National Security Strategy* replaces the clear legal rule of self-defense with a vague and necessarily speculative balancing test in which the greater the threat, the less certainty there needs to be about the probability of the risk eventuating.⁵³ The administration makes no attempt to define when a threat is sufficient to justify the use of force.⁵⁴ As former administration official John Yoo recognized, the preventive war doctrine is based upon a flexible cost-benefit standard rather than the clear rule contained in the UN Charter.⁵⁵

The open-ended standard of the preventive war doctrine eviscerates the notion of legal rules controlling warfare, a point perhaps best described by Abram Chayes, the legal advisor to the State Department during the Cuban missile crisis.⁵⁶ In explaining why the Kennedy administration refused to rely on preventive self-defense to justify its actions, Chayes accepted that the notion of self-defense included an anticipatory response to an *imminent* attack.⁵⁷ But to permit preventive self-defense where there is no threatened imminent attack, he maintained, would mean that "[t]here is simply no standard against which this decision could be judged. Whenever a nation believed that interests, which in the heat and pressure of a crisis it is prepared to characterize as vital, were threatened, its use of force in response would become permissible."⁵⁸ Because such a doctrine would destroy any clear limits on the use of force, Chayes argued that it would amount to a concession that "law simply does not deal with such questions of ultimate power."⁵⁹

52. JEFFREY RECORD, *DARK VICTORY: AMERICA'S SECOND WAR AGAINST IRAQ* 32 (2004) (quoting Richard Armitage).

53. NATIONAL SECURITY STRATEGY, *supra* note 7, at 13–16.

54. Yoo, *supra* note 25, at 735.

55. *Id.* at 730, 758–62, 787.

56. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* 6 (1974).

57. *Id.* at 65.

58. *Id.*

59. *Id.* (quoting Dean Acheson, Remarks at the Proceedings of the Ameri-

This imminent attack requirement has prompted the Bush administration to claim that it has merely “adapt[ed] the concept of imminent threat to the capabilities and objectives of today’s adversaries.”⁶⁰ Yoo and other administration officials have attempted to redefine imminence to shift the inquiry from timing to probability of harm. Yoo argues that the post-9/11 world “renders the imminence standard virtually meaningless, because there is no ready means to detect whether a terrorist attack is about to occur.”⁶¹ Therefore, the imminence standard applied literally to a world of modern weaponry, rogue states, and terrorists “would be a suicide pact.”⁶² Instead of defining imminence as the moment when a blow is just about to land, Yoo would define imminence in terms of the likelihood of the attack occurring. Where the magnitude of the harm is great, as in a potential terrorist nuclear attack on the United States, Yoo would require a lesser probability.⁶³ In short, the preventive war doctrine substitutes ad hoc balancing for clear rules.

The problem with substituting “probable” or even “inevitable” for “imminent” is that odds-making is an inherently speculative enterprise. We simply cannot know whether the odds were five percent, fifty percent, or ninety percent that Saddam Hussein eventually would have obtained and used weapons of mass destruction against the United States or given them to terrorists to use against the United States. As former German Chancellor Otto van Bismarck once remarked in rejecting similar arguments for preventive war, “one can never anticipate the ways of divine providence securely enough for that.”⁶⁴ A test that requires decision makers to divine the possibility of a probable attack in the future contains no meaningful standard at all.

can Society of International Law, 57th Annual Meeting 14 (Apr. 25–27, 1963), in *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 107, 108 (Robert J. Beck et al. eds., 1996)).

60. NATIONAL SECURITY STRATEGY, *supra* note 7, at 15. “[N]ew technology requires new thinking about when a threat actually becomes ‘imminent.’” Condoleezza Rice, Remarks on the President’s National Security Strategy at the Waldorf Astoria Hotel in New York City (Oct. 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html>.

61. Yoo, *supra* note 25, at 750.

62. *Id.* at 756.

63. *Id.* at 753–55.

64. GORDON A. CRAIG, *THE POLITICS OF THE PRUSSIAN ARMY 1640–1945*, at 255 (1955) (quoting Otto van Bismarck).

The other coercive preventive tactics employed as part of this new paradigm also substitute vague balancing tests for clear rules. Few rules are clearer than domestic and international law's absolute ban on torture and cruel and inhumane treatment.⁶⁵ Yet, driven by the need to obtain information believed essential to preventing future terrorist attacks, the administration effectively abandoned the law's clear rule and embraced a totality of circumstances, ad hoc balancing test. In the Office of Legal Counsel's August 1, 2002 memorandum on torture, Assistant Attorney General Jay Bybee not only set forth an extremely narrow view of what constitutes torture, but also argued that government employees who engage in torture would have a defense of necessity, based on a vague balancing of the likelihood that a suspect had information needed to prevent a future attack and the magnitude of the potential harm.⁶⁶

The Bybee memo was consistent with the administration's amorphous, ill-defined pledge to treat detainees humanely where "consistent with military necessity."⁶⁷ Administration officials provided an ambiguous definition for "inhumane treatment," claiming that techniques such as waterboarding, mock executions, physical beatings, and painful stress positions could be lawful "depend[ing] on the facts and circumstances" of each particular case.⁶⁸ That approach led soldiers to complain that there were no clear rules for interrogations.⁶⁹

Similarly, when Attorney General Ashcroft oversaw the round-up of more than one thousand foreign nationals in the weeks after 9/11, he substituted a vague standard for a clear rule in order to justify holding them without charges for ex-

65. 18 U.S.C. §§ 2340–2340A (2000); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, *supra* note 42, art. 4.

66. Memorandum from Jay S. Bybee, U.S. Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes, Gen. Counsel to the Dep't of Def. (Jan. 22, 2002), *reprinted in* THE TORTURE PAPERS 81, 108 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

67. Memorandum from George W. Bush, U.S. President, to Richard Cheney, U.S. Vice President, et al., on the Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 66, at 134, 135.

68. Editorial, *Mr. Flanigan's Answers*, WASH. POST, Sept. 28, 2005, at A20 (quoting Timothy Flanigan, Nominee to be Deputy Attorney General, in response to written questions from Senator Richard Durbin).

69. Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST, Oct. 6, 2005, at A1.

tended periods of time.⁷⁰ Had those nationals been arrested under criminal law, prosecutors would have faced a constitutional mandate to charge them immediately and to demonstrate, within forty-eight hours before a federal judge, the existence of probable cause that they had committed a crime.⁷¹ Before 9/11, immigration regulations contained a similar bright-line rule, requiring that charges be filed within twenty-four hours of any arrest.⁷² Even the USA PATRIOT Act (Patriot Act),⁷³ while significantly expanding executive power to detain persons without charging them, still maintained a clear rule. That Act provided the Attorney General with the authority to detain a non-citizen for as long as seven days without charging them with a crime, upon certification that the authority has “reasonable grounds to believe” that the non-citizen is engaged in terrorist activities or other activities that threaten national security.⁷⁴ Yet Ashcroft chose not to rely on the Patriot Act, but rather on a newly enacted regulation replacing the bright-line rule with a provision allowing the government in times of emergency to detain aliens for a “reasonable period of time” while it investigates the detainee.⁷⁵ What was “reasonable” turned out to be measured in weeks and months.

The administration discarded the clear rules relating to the detention of prisoners of war and instead claimed the authority to indefinitely detain “unlawful enemy combatants,” a term which remains ill-defined. Until 2001, this term appeared nowhere in U.S. criminal law, international law, or the law of war.⁷⁶ It was appropriated from the U.S. Supreme Court’s opin-

70. See *infra* text accompanying note 75.

71. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

72. Administrative Comment, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397, 399 (2001).

73. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

74. *Id.* § 412, 115 Stat. at 350–52 (codified at 8 U.S.C. § 1226a).

75. 8 C.F.R. § 287.3(d) (2001).

76. Gary Solis, *Even a Bad Man Has Rights*, WASH. POST, June 25, 2002, at A19; see also ABA TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, REPORT TO THE HOUSE OF DELEGATES 4 (2003) [hereinafter ABA REPORT], available at <http://www.abanet.org/leadership/recommendations03/109.pdf> (describing the various forms of the term “combatants” in domestic and international law).

ion in *Ex parte Quirin*.⁷⁷ At first, the government provided virtually no criteria at all for defining enemy combatants. A plurality of the Supreme Court in *Hamdi v. Rumsfeld* upheld the government's authority to detain an individual as an enemy combatant, but for the purpose of that case defined the term "enemy combatant" narrowly as an individual who was "part of or supporting forces hostile to the United States or its coalition partners" in Afghanistan and "who engaged in an armed conflict against the United States there."⁷⁸ After *Hamdi*, the government did not adopt the Court's definition, but instead drafted vague regulations that would include as an enemy combatant persons who had never committed a belligerent act and who never directly supported hostilities against the United States.⁷⁹ The government conceded that its definition of an enemy combatant would cover a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,' [or] a person who teaches English to the son of an al-Qaeda member."⁸⁰ Similarly, William Haynes II, General Counsel of the Department of Defense, defined the term enemy combatant in December 2002 as a member, agent, or associate of al Qaeda or the Taliban.⁸¹ The use of the term associate harkens back to the McCarthy era's attacks on those who associated in any way with the Communist Party.⁸²

The Military Commissions Act of 2006, enacted by Congress in response to the Court's *Hamdan v. Rumsfeld* decision,⁸³ also includes a definition with no clear standard as to who can be indefinitely detained as a preventive matter without charge in the war on terror.⁸⁴ The Act defines an unlawful enemy combatant as "a person who has engaged in hostilities

77. 317 U.S. 1, 31 (1942); accord ABA REPORT, *supra* note 76, at 4; Solis, *supra* note 76.

78. 542 U.S. 507, 516 (2004) (quoting Brief for the Respondents at 3, *Hamdi*, 542 U.S. 507 (2004) (No. 03-6696)).

79. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).

80. *Id.* (citation omitted).

81. Memorandum from William J. Haynes, Gen. Counsel of the Dep't of Def. to Members of the Am. Soc'y of Int'l Law Council of Foreign Relations (Dec. 12, 2002), available at http://www.cfr.org/publications/5312/enemy_combatants.html.

82. See DAVID COLE, ENEMY ALIENS 129–53 (2003).

83. 126 S. Ct. 2749 (2006).

84. Military Commissions Act of 2006 § 3, Pub. L. No. 109-366, 120 Stat. 2600, 2601–02 (codified at 10 U.S.C. § 948a).

or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant.”⁸⁵ The Act, however, leaves unclear who exactly is covered by the ambiguous phrase “purposefully and materially supported hostilities against the United States or its co-belligerents.”⁸⁶ The government could claim that any civilian who knowingly teaches English to the son of an al Qaeda member is covered under the definition, despite the absence of any belligerent act or any direct support of hostilities. Even more standardless than that definition, the statute also provides that persons can be considered enemy combatants so long as they have been so deemed “by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.”⁸⁷ This circular reasoning establishing that a person is an enemy combatant if the government says so provides no standard whatsoever.

The preventive paradigm’s substitution of amorphous balancing tests for clear rules in all these areas invites abuse. Indeed, the history of governmental use of physical coercion for pretextual reasons against disfavored minorities, dissenters, aliens, and weaker nations is one important reason for the law’s insistence on reasonably clear rules limiting the state’s coercive power.⁸⁸ The preventive war doctrine is particularly susceptible to pretextual justifications. Some suspect, for example, that the administration’s emphasis on illicit weapons and on the connection between Iraq and al Qaeda were pretexts to justify a war that the administration actually launched for other reasons: increasing American influence in the Middle East, spreading democracy, or simply demonstrating United States resolve to its enemies.⁸⁹ That suspicion is furthered by the fact that for years prior to the September 11 attacks key administration officials, most notably Paul Wolfowitz, had ad-

85. *Id.* (emphasis added).

86. *See id.*

87. *Id.*

88. *Cf. Trinkler v. Alabama*, 414 U.S. 955, 957 (1973) (Douglas, J., dissenting) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”).

89. *E.g.*, Thomas L. Friedman, Editorial, *A War for Oil?*, N.Y. TIMES, Jan. 5, 2003, § 4, at 11; Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOREIGN AFF., Mar.–Apr. 2006, at 15, 15–16; James P. Rubin, *Stumbling into War*, FOREIGN AFF., Sept.–Oct. 2003, at 46, 48.

vocated war to get rid of Saddam Hussein.⁹⁰ Indeed, after the war Wolfowitz admitted that the administration chose the weapons of mass destruction rationale for “bureaucratic reasons,” as it was “the one reason everyone could agree on.”⁹¹

Paul Pillar, the intelligence community’s senior analyst for the Middle East from 2000 to 2005,⁹² concluded that the administration’s invasion of Iraq was not based on its concern about Iraqi weapon programs. In a recent article in *Foreign Affairs*, Pillar stated that the administration’s “decision to topple Saddam was driven by other factors—namely, the desire to shake up the sclerotic power structures of the Middle East and hasten the spread of more liberal politics and economics in the region.”⁹³ For Pillar, what was most remarkable about prewar U.S. intelligence on Iraq was not how wrong it was, but that it played so small a role in the decision to go to war.⁹⁴ Pillar, in charge of coordinating all of the intelligence community’s assessments regarding Iraq, did not receive a single request from any administration policymaker for any such assessment prior to the war.⁹⁵

Even where a government is not acting pretextually, but honestly believes coercive preventive measures are necessary to prevent a terrorist attack, the absence of clear rules creates a strong danger of abuse. For example, the government’s vague instructions governing interrogations allowed some soldiers to engage in inhumane tactics not simply for sadistic reasons but also in the course of honestly attempting to obtain information, as apparently happened frequently at Guantánamo and in detention centers in Iraq.⁹⁶ Ad hoc balancing thus provides little or no restraint on wrongful executive conduct, whether such conduct is undertaken pretextually or for sincere reasons.

90. *United States Policy Toward Iraq: Hearing Before the H. Comm. on National Security*, 105th Cong. 74–78 (1998) (statement of Paul Wolfowitz).

91. JOSEPH CIRINCIONE ET AL., *WMD IN IRAQ: EVIDENCE AND IMPLICATIONS* 13 (2004).

92. Pillar, *supra* note 89, at 15.

93. *Id.* at 16.

94. *Id.* at 17–18.

95. *Id.*

96. *E.g.*, Kevin Bohn et al., *FBI Reports Guantanamo “Abuse,”* CNN.COM, Dec. 8, 2004, <http://www.cnn.com/2004/US/12/08/guantanamo.abuse/>.

B. SUBSTITUTING SUSPICION FOR OBJECTIVE EVIDENCE

Closely linked to the law's requirement that clear rules, not vague standards, limit a government's ability to use coercive measures against individuals or other states, is the requirement that such measures be based on objectively determinable proof and not mere suspicion. Yet predicting future threats inevitably relies on suspicion, inference, probabilities, circumstantial evidence, and hunches rather than on solid, objective, and visible evidence. Professor George Fletcher at Columbia University aptly articulated the reason that democratic law generally forbids the preventive use of force against both other states as well as individuals:

Preemptive strikes are illegal in international law as they are illegal internally in every legal system of the world. They are illegal because they are not based on a visible manifestation of aggression; they are grounded in a prediction of how the feared enemy is likely to behave in the future.⁹⁷

There are, of course, occasions when the state can use force to prevent a wrong that has not yet occurred: to thwart conspiracies or attempted attacks, or to respond to imminent attacks from another nation.⁹⁸ Conspiracies or attempts, however, generate some objective evidence of an agreement to commit wrongdoing, and the law requires some overt act in furtherance of the plan or some evidence of a substantial step to commit wrongdoing.⁹⁹ In contrast, in times of emergency the state often claims that its preventive response cannot be limited by a rule requiring objective evidence that a crime is being planned and that concrete steps have been taken in furtherance of the crime; rather, the government claims that a coercive response may be based on suspicion.¹⁰⁰

The substitution of suspicion for objective evidence can be seen in the administration's coercive preventive measures: pre-

97. GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 134 (1998); see also Jane Campbell Moriarty, "While Dangers Gather": *The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 21–22 (2005). While the *Model Penal Code* attempted to introduce some flexibility into the concept of imminence, *id.* at 21 n.112, most states have adhered to the traditional notion of imminence as temporally imminent, and even the states that have interpreted the language liberally still require that the defendant have a reasonable "perception of imminent harm," *id.* at 21 n.111.

98. See *supra* text accompanying notes 48–51.

99. See MODEL PENAL CODE §§ 5.01(1), 5.03(5) (1985).

100. See RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11, at 166 (2006).

ventive war, preventive detention, and extraordinary rendition. To justify each of these tactics, the administration has presented suspicions and hunches masquerading as objective certainty. As journalist Ron Suskind reported, the war on terror has been guided by little more than “the principle of actionable suspicion,” as one former intelligence chief called it.¹⁰¹ “We were operating, frantically, in a largely evidence-free environment. But the whole concept was that not having hard evidence shouldn’t hold you back.”¹⁰² As Vice President Dick Cheney argued, if there is just a one percent chance of the unimaginable happening, we have to treat that chance as a certainty.¹⁰³

The preventive paradigm’s treatment of suspicion as objective fact was most evident in the administration’s headlong drive toward war against Iraq from 2002 to 2003.¹⁰⁴ The administration’s suspicions that Iraq was hiding stocks of chemical and biological weapons were shared by many observers, including Hans Blix, the director of the UN Monitoring, Verification and Inspection Commission for Iraq (known as UNMOVIC), whose task was to determine Iraqi compliance with the UN’s mandate that it destroy its dangerous weapons and dismantle its prohibited weapons programs.¹⁰⁵ But as a lawyer and long-time diplomat, Blix viewed his mandate as most lawyers would: to find solid, reliable evidence to determine whether Iraq still had or was producing weapons of mass destruction.¹⁰⁶ Despite his “gut feeling” that Iraq was hiding stocks of chemical and biological weapons, Blix had not been “asked by the Security Council to submit suspicions or simply to convey testimony from defectors.”¹⁰⁷ “Assessments and judgments in our reports,” Blix felt, “had to be based on evidence that would remain convincing even under critical international examination.”¹⁰⁸

Blix’s focus on solid evidence—evidence that would withstand critical international scrutiny—of whether Iraq actually had outlawed weapons increasingly collided with the preventive paradigm’s inevitable reliance on suspicion, inferences,

101. *Id.*

102. *Id.*

103. *Id.* at 62.

104. *See id.* at 166–68.

105. HANS BLIX, DISARMING IRAQ 3, 264 (2004).

106. *Id.* at 264.

107. *Id.*

108. *Id.*

probabilities, circumstantial evidence, and hunches. As National Security Advisor Condoleezza Rice and President Bush argued, waiting for conclusive proof of Saddam Hussein's determination to obtain nuclear weapons was simply too risky, because "we don't want the smoking gun to become a mushroom cloud."¹⁰⁹

U.S. officials repeatedly treated suspicions as if they were fact. Administration officials continuously asserted that they were not merely suspicious of Iraq, but rather that they "knew," were "absolutely certain," or had "no doubt" that Saddam Hussein had a reconstituted nuclear weapons program, had hundreds of tons of chemical and biological weapons, and was producing more of such weapons. On September 8, 2002, for example, Vice President Cheney stated on *Meet the Press* that we "know, with *absolute certainty* that [Saddam Hussein] is using his procurement system to acquire the equipment he needs in order to enrich uranium to build a nuclear weapon."¹¹⁰ On *Fox News*, Secretary of State Colin Powell claimed that "[t]here's *no doubt* that [Saddam Hussein] has chemical weapon stocks."¹¹¹ A month later, in a speech in Cincinnati, Ohio, President Bush again exuded certainty: "If we know Saddam Hussein has dangerous weapons today—and *we do*—does it make any sense for the world to wait to confront him as he grows even stronger and develops even more dangerous weapons?"¹¹² In March 2003, Secretary of Defense Donald Rumsfeld made the astounding claim that U.S. officials not only knew that Iraq had weapons of mass destruction, but knew their location. "We know where they are," he told *ABC News*.¹¹³

Hans Blix and his inspection team sought to find objective evidence to verify these claims.¹¹⁴ The inspectors searched al-

109. RECORD, *supra* note 52, at 33 (citing Scott Peterson, *Can Hussein Be Deterred?*, CHRISTIAN SCI. MONITOR, Sept. 10, 2002, at A1). President Bush also said in an October 7, 2002 speech in Cincinnati, Ohio that "[f]acing clear evidence of peril, we cannot wait for the final proof, the smoking gun, that could come in the form of a mushroom cloud." Address to the Nation on Iraq from Cincinnati, Ohio, *supra* note 22, at 1754.

110. *Meet the Press* (NBC television broadcast Sept. 8, 2002) (emphasis added).

111. *Fox News Sunday* (Fox News Network television broadcast Sept. 8, 2002) (emphasis added).

112. Address to the Nation on Iraq from Cincinnati, Ohio, *supra* note 22, at 1752 (emphasis added).

113. *This Week with George Stephanopoulos* (ABC television broadcast Mar. 30, 2003).

114. BLIX, *supra* note 105, at 264.

most seven hundred sites for potential evidence of prohibited chemical, biological, or nuclear weapons, including many sites identified by U.S. and other nations' intelligence services.¹¹⁵ Blix reported that "at none of the many sites we actually inspected had we found any prohibited activity."¹¹⁶

Similarly, the International Atomic Energy Agency (IAEA), after three months of intrusive inspections, including the inspections of all sites identified in overhead satellite imaging as having suspicious activity, found no evidence or plausible indication of the revival of a nuclear weapons program in Iraq.¹¹⁷ The IAEA concluded after extensive investigation that the much publicized aluminum tubes that Iraq had attempted to import were not likely to have been connected to the manufacture of centrifuges for the enrichment of uranium.¹¹⁸ And, the IAEA and outside experts also determined that the reported uranium contracts between Iraq and Niger, cited by President Bush in his 2003 State of the Union address, were forgeries.¹¹⁹

Administration officials' claims that Iraq had a collaborative relationship with al Qaeda were also based on suspicions, surmise, possibilities, and speculative, secret intelligence masquerading as reliable fact. After the September 11 attacks, Wolfowitz estimated that there was a ten to fifty percent chance that Iraq was behind the attacks—a probability analysis based on no reliable intelligence data.¹²⁰ Immediately after September 11, Wolfowitz and Rumsfeld urged the President to confront Iraq.¹²¹ President Bush had the same gut feeling, telling his advisors that "I believe Iraq was involved."¹²²

While the U.S. intelligence community generally correctly concluded that Iraq and al Qaeda had no collaborative relationship,¹²³ President Bush repeatedly claimed that Saddam Hus-

115. *Id.* at 156.

116. *Id.*

117. U.N. SCOR, 58th Sess., 4714th mtg. at 8, U.N. Doc. S/PV.4714 (Mar. 7, 2003).

118. *Id.* at 7.

119. *Id.* at 8.

120. DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* 147 (2005).

121. *Id.*

122. *Id.*

123. *Staff Statement No. 15 "Overview of the Enemy,"* in 4 *THE 9/11 COMMISSION PROCEEDINGS AND ANALYSIS* 441, 445 (2005) (concluding that there was no "collaborative relationship" between Saddam Hussein and al Qaeda); *see also* S. REP. NO. 108-301, at 346 (2004) ("The Central Intelligence Agency

sein was “dealing with Al Qaeda,”¹²⁴ had “provided al Qaeda with chemical and biological weapons training,”¹²⁵ and that “you can’t distinguish between al Qaeda and Saddam when you talk about the war on terror.”¹²⁶ In addition, Colin Powell warned the Security Council of the “sinister nexus between Iraq and the al Qaeda terrorist network.”¹²⁷

Administration officials afterwards admitted that they had lacked concrete facts, but argued that they needed to act based on possibilities, not objective evidence. Powell later admitted that he indeed had no “smoking gun, *concrete evidence* about the connection” between Iraq and al Qaeda.¹²⁸ “But,” he continued, “I think *the possibility* of such connections did exist.”¹²⁹ General Richard B. Myers, Chairman of the Joint Chiefs of Staff, recognized the limitations of intelligence. “Intelligence doesn’t necessarily mean something is true,” he said at a Pentagon news briefing after major combat ended in Iraq.¹³⁰ He further remarked that “You know it’s your best estimate of the situation. It doesn’t mean it’s a fact. I mean, that’s not what intelligence is.”¹³¹ In the absence of hard evidence on Iraqi programs, officials developed a “mosaic,” or a “threat picture,” and “connected a lot of dots from multiple sources” to form a “judgment.”¹³² Or as Donald Rumsfeld later conceded, we “did not

reasonably assessed that there were likely several instances of contacts between Iraq and al-Qaida throughout the 1990s, but that these contacts did not add up to an established formal relationship.”); Douglas Jehl, *Questioning Nearly Every Aspect of the Responses to Sept. 11 and Terrorism*, N.Y. TIMES, June 18, 2004, at A18.

124. The President’s News Conference, 2 PUB. PAPERS 2039, 2049 (Nov. 7, 2002).

125. The President’s Weekly Radio Address, 1 PUB. PAPERS 140, 140 (Feb. 8, 2003).

126. Remarks Prior to Discussions with President Alvaro Uribe of Columbia and an Exchange with Reporters, 2 PUB. PAPERS 1656, 1657 (Sept. 25, 2002).

127. *Powell’s Address, Presenting ‘Deeply Troubling’ Evidence on Iraq*, N.Y. TIMES, Feb. 6, 2003, at A18 (transcript of Secretary of State Colin Powell’s address to the United Nations Security Council).

128. Christopher Marquis, *Powell Admits No Hard Proof in Linking Iraq to Al Qaeda*, N.Y. TIMES, Jan. 9, 2004, at A10 (emphasis added).

129. *Id.*

130. James Risen et al., *In Sketchy Data, Trying to Gauge Iraq Threat*, N.Y. TIMES, July 20, 2003, at A1.

131. *Id.*

132. CIRINCIONE ET AL., *supra* note 91, at 17 (quoting *This Week with George Stephanopoulos* (ABC television broadcast June 8, 2003) (Condoleezza Rice); *Meet the Press* (NBC television broadcast Sept. 8, 2002) (Dick Cheney)).

act in Iraq because we had discovered dramatic new evidence of Iraq's pursuit of weapons of mass destruction. We acted because we saw the existing evidence in a new light through the prism of our experience on 9/11."¹³³

Therefore, even if the administration was not using the preventive rationale as a pretext to achieve other goals, the administration's substitution of suspicion for observable, verifiable evidence allowed real fears to distort, shade, or color the actual evidence so as to, in Cheney's words, treat a very small possibility as if it were a certainty.¹³⁴ To Blix, the administration in effect adopted a "faith-based" approach to war: the administration "knew," as if on faith, that Hussein was evil, had dangerous weapons, and was associated with evildoers like Osama bin Laden.¹³⁵ All it needed to do was to find the evidence to confirm that view. Blix analogized the administration's approach to the Salem Witch Trials: "The witches exist; you are appointed to deal with these witches; testing whether there are witches is only a dilution of the witch hunt."¹³⁶ As in the Middle Ages, because people were convinced there were witches, "they certainly found them."¹³⁷

The substitution of suspicion for objective evidence is endemic to the preventive paradigm, for predictions about the future are inherently speculative. This same substitution characterizes the administration's coercive prevention programs that it has used to fight the war on terror since September 11. As with Iraq, suspicion often masquerades as certainty.

The extraordinary rendition of Maher Arar to Syria illustrates the preventive paradigm's reliance on suspicion, often with draconian results. Arar, a Canadian citizen born in Syria, was on his way home to Canada from a family vacation in Tunisia in September 2002 when he stopped to change planes at Kennedy Airport in New York.¹³⁸ He was detained by the U.S. government at the airport based on information supplied by the

133. RECORD, *supra* note 52, at 112.

134. SUSKIND, *supra* note 100, at 62.

135. BLIX, *supra* note 105, at 263.

136. *Id.* at 202.

137. *Blix Attacks Iraq Weapons 'Spin,'* CNN.COM, Sept. 18, 2003, <http://www.cnn.com/2003/WORLD/meast/09/18sprj.iq.blix.bush/index.html> (quoting Hans Blix).

138. *60 Minutes II: His Year in Hell* (CBS television broadcast July 15, 2005).

Canadian Royal Mounted Police.¹³⁹ The Canadian Police had sent a report to the United States which, based on Arar's mere acquaintances with other men under suspicion of being terrorists, listed Arar and his wife as "Islamic Extremist individuals suspected of being linked to the al Qaeda terrorist movement."¹⁴⁰ The Canadian suspicions turned out to be completely false. After an exhaustive two-year investigation, in September 2006, a Canadian Commission chaired by appellate judge Dennis R. O'Connor concluded that Arar was never a member of al Qaeda or associated with any terrorist group.¹⁴¹ Judge O'Connor stated "categorically that there is no evidence to indicate that Mr. Arar has committed any offense or that his activities constitute a threat to the security of Canada."¹⁴²

Nonetheless, the U.S. Justice Department detained Arar in New York for two weeks, harshly interrogated him, and then secretly flew him to Jordan, where he was then taken to Syria.¹⁴³ The Syrians held him in a tiny cell termed the grave cell, and in the initial weeks of detention tortured him.¹⁴⁴ Over a year later, after concluding that Arar had no connection to terrorism, the Syrian government released him.¹⁴⁵

At the time the U.S. government rendered Arar to Syria it knew that it had no objective evidence that Arar was a terrorist or al Qaeda member.¹⁴⁶ Nonetheless, INS officials operated as if they were certain that Arar was a terrorist. In deciding to deport Arar, the INS Regional Director determined that the evidence "clearly and unequivocally reflects that Mr. Arar is a member of a foreign terrorist organization, to wit, Al Qaeda."¹⁴⁷ Yet, according to the Canadian Commission's Report, only three days earlier, Canadian counter-terrorism officials sent a fax to the FBI which stated that while Arar "had contact with"

139. *Ottawa Must Act Now on RCMP Watchdog: Arar*, CBC NEWS, Dec. 12, 2006, <http://www.cbc.ca/canada/story/2006/12/12/oconnor-report.html?ref=rss>.

140. COMM'N OF INQUIRY INTO THE ACTIONS OF CAN. OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 20–21 (2006) [hereinafter CAN. COMM'N REPORT].

141. *See id.*

142. *Id.* at 59.

143. *60 Minutes II*, *supra* note 138.

144. *Id.*

145. *Id.*

146. CAN. COMM'N REPORT, *supra* note 140, at 154.

147. Scott Shane, *Torture Victim Had No Terror Link, Canada Told U.S.*, N.Y. TIMES, Sept. 25, 2006, at A10.

suspicious individuals, the officials were “unable to indicate links to al-Qaeda,” and had “yet to complete . . . a detailed investigation of Mr. Arar.”¹⁴⁸ The Commission also reported that the next day a Canadian official and an FBI officer spoke by phone and both concluded that there was insufficient evidence to charge Arar with a crime either in Canada or in the United States—a conclusion that would not have been true if they had clear and unequivocal information that Arar was an al Qaeda member.¹⁴⁹

Not only did U.S. officials inflate the information they received from Canada, treating suspicion as if it were clear and unequivocal evidence, but they also kept Canadian officials in the dark about their plans for Arar. The Canadian foreign ministry was not initially informed of Arar’s detention, and American officials denied Mr. Arar’s requests to talk to the Canadian Consulate in New York, a violation of U.S. treaty obligations with Canada.¹⁵⁰ The Canadian Commission concluded that the American officials kept Canadian officials in the dark about the plans with respect to Arar because they “believed—quite correctly—that, if informed, the Canadians would have serious concerns about the plan to remove Mr. Arar to Syria.”¹⁵¹ Even after Arar’s deportation to Syria, the U.S. government did not inform Canada of Arar’s whereabouts, and the Canadians only learned two weeks later from the Syrians that he was there.¹⁵² Once the Canadians learned that Arar was in Syria, his torture and interrogations stopped.¹⁵³

The Arar case raises the question of why the U.S. government would send a detained Canadian citizen whom it suspects may be a terrorist to Syria, a country which the State Department accuses of practicing torture and being a state sponsor of terrorism, and not to Canada, the United States’ friend and ally. The answer lies in the preventive paradigm: U.S. government officials must have believed that Syria would detain and use coercive interrogation methods on Arar to obtain information needed to prevent future terrorist acts—information that could not be obtained by normal police methods used by Canada or the United States. The Canadian Commission Report

148. CAN. COMM’N REPORT, *supra* note 140, at 148.

149. *Id.* at 152.

150. *Id.* at 172.

151. *Id.* at 158.

152. *Id.* at 154, 184.

153. *Id.* at 188–89.

found that, unlike Syria, Canada would not have detained Arar.¹⁵⁴ Canadian officials told their American counterparts that they would place Arar under surveillance.¹⁵⁵ But that measure obviously did not suffice for the United States; relying on suspicions, the U.S. government wanted to detain Arar and coerce him into disclosing what U.S. officials believed he knew.

Similarly, the more than one thousand mainly Muslim immigrants rounded up after September 11 were detained based on mere suspicions, often with no objective evidence, and sometimes held for months before the government released them or deported them for immigration violations unrelated to terrorism.¹⁵⁶ As one example, a Yemeni man was arrested after accompanying his American wife to her military base in Kentucky because his wife was wearing a hijab (the head scarf that many Muslim women wear).¹⁵⁷ The FBI investigators noticed the couple speaking a foreign language—French—and in their suitcase they carried box cutters which they had both used in their work.¹⁵⁸ He was held for almost two months without any evidence ever being presented against him.¹⁵⁹ His wife, who had also been detained, accepted an honorable discharge from the Army.¹⁶⁰ Indeed, of the more than five thousand aliens who have been preventively detained in the United States since September 11, not one has been convicted of any terrorist crime.¹⁶¹

An inherent problem with the preventive paradigm's reliance on suspicions and hunches about future conduct is what psychologists and scientists have long recognized to be a deeply rooted human tendency to interpret evidence in a manner that confirms one's preexisting theories or beliefs.¹⁶² As early as

154. *Id.* at 154.

155. *Id.*

156. COLE, *supra* note 82, at 25–26.

157. *Department of Justice Oversight: Preserving Our Freedom While Defending Against Terrorism Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 215–17 (2001) (statement of Ali Al-Maqtari).

158. *Id.* at 216.

159. *Id.* at 217.

160. *Id.*

161. See COLE, *supra* note 82, at 26; Alex Gourevitch, *Detention Disorder: Ashcroft's Clumsy Round-up of Foreigners Lurches Forward*, AM. PROSPECT ONLINE, Jan. 31, 2003, <http://www.prospect.org/webfeatures/2003/01/gourevitch-a-01-31.html>.

162. See, e.g., Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175–77 (1998).

1620, Sir Francis Bacon explained this phenomenon:

The human understanding when it has once adopted an opinion draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects, in order that by this great and pernicious predetermination the authority of its former conclusion may remain inviolate.¹⁶³

Such “confirmation bias” was certainly operative in the run up to the Iraq war, as U.S. officials cherry-picked and manipulated the facts, exaggerating evidence supporting their position and disregarding contrary indications.¹⁶⁴ As the Senate Commission investigating the intelligence failure leading to the Iraq war observed, there was “a tendency of analysts to believe that which fits their theories,” and that analysts had “tunnel vision,” meaning that they “simply *disregarded* evidence that did not support their hypotheses.”¹⁶⁵

Senior intelligence official Paul Pillar suggests that intelligence analysts and policymakers seeking to tie an individual or government to terrorism face other common biases and difficulties.¹⁶⁶ Finding a tie between a particular government or individual and a terrorist organization is particularly subject to bias because

[i]n the shadowy world of international terrorism, almost anyone can be “linked” to almost anyone else if enough effort is made to find evidence of casual contacts, the mentioning of names in the same breath, or indications of common travels or experiences. Even the most minimal and circumstantial data can be adduced as evidence of a “relationship”¹⁶⁷

Law cannot rid us of the predisposition to perceive evidence through the lens of our preconceptions, nor can it eliminate the other biases that affect policymakers and intelligence analysts. But one function of law is to create institutional and normative safeguards to counteract these biases. One means of offsetting bias is to require objectively verifiable evidence of wrongdoing, rather than relying on suspicions or hunches mas-

163. Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979) (quoting Sir Francis Bacon).

164. See Pillar, *supra* note 89, at 19.

165. THE COMM’N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 87, 162, 169 (2005).

166. Pillar, *supra* note 89, at 20–21.

167. *Id.*

querading as fact. Because it substitutes open-ended prediction for hard evidence, the preventive paradigm opens the door to biases, preconceptions, and conscious or unconscious manipulation of the evidence.

C. THE ABSENCE OF INSTITUTIONAL CHECKS

The inherent tension between the rule of law and the preventive paradigm is heightened by the government's insistence that executive discretion requires discarding institutional checks on its power—checks that are ordinarily provided by independent review. The government thus claims that its authority to launch a preventive war is not subject to the UN Charter's requirement that the Security Council approve of such wars.¹⁶⁸ The government has engaged in extraordinary renditions of over one hundred individuals, yet when it is challenged in court by Arar, or by the German citizen El-Masri, who was kidnapped by mistake, the administration has argued, thus far successfully, that its actions are shielded from judicial review by the state secrets doctrine, the political question doctrine, and other principles which counsel against judicial scrutiny.¹⁶⁹ In order to prevent judicial scrutiny of the detention of aliens after September 11, the administration promulgated another emergency regulation that provided for an automatic stay of bond pending appeal, de facto allowing the government to detain aliens for more than a year before courts could order their release.¹⁷⁰ And, the administration argued that any alien detained abroad as an enemy combatant was not entitled to a hearing to determine if he was in fact a combatant, and the judiciary could not scrutinize any such detention.¹⁷¹ According to the government, even U.S. citizens detained as enemy combatants were entitled to only limited judicial review to determine whether the government facially set forth some evidentiary ba-

168. See The President's News Conference, 1 PUB. PAPERS 255, 251 (Mar. 6, 2003) ("I'm confident the American people understand that when it comes to our security, if we need to act, we will act, and we really don't need United Nations approval to do so.").

169. Arar v. Ashcroft, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006), *appeal docketed*, No. 1:04CV00249 (2d Cir. Sept. 12, 2006); El-Masri v. Tenet, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006), *aff'd*, No. 06-1667, 2007 WL 625130 (4th Cir. Nov. 28, 2006).

170. Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 780 (2002).

171. Brief of Respondents at 21, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-345).

sis for the detention.¹⁷² After the Supreme Court rejected both of these propositions, the administration nonetheless succeeded in pressing Congress to remove the judiciary's habeas jurisdiction over aliens detained as enemy combatants.¹⁷³

The administration's short-circuiting of independent checks on executive power is related to the administration's acceptance of vague standards and suspicions in place of objective evidence of clearly defined wrongdoing. For an independent entity to allow the United States to take preventive coercive action, the entity would require the government to proffer some objective evidence. For example, a majority of nations on the Security Council refused to authorize the United States-led preventive war against Iraq, in part because inspectors had not uncovered any objective evidence that Iraq was hiding prohibited weapons.¹⁷⁴ Hence, the United States had to circumvent the Security Council.¹⁷⁵ In addition, it is hard to believe that any U.S. court would have authorized Arar's deportation to Syria; therefore, the administration misled Arar's lawyer and the Canadians, thereby denying Arar the opportunity to challenge his pending deportation in court.¹⁷⁶ And when the government was forced by the Supreme Court to provide alleged enemy combatant Hamdi a due process hearing, the government released him to Saudi Arabia rather than conduct such a hearing.¹⁷⁷

II. BALANCING LIBERTY, PEACE AND SECURITY

The argument for coercive preventive measures is based on a purported trade-off between liberty and security. Proponents of the preventive paradigm contend that the normal rules of law are too heavily weighted in favor of liberty to be useful in a national emergency or crisis. Supporters of supplanting those rules, such as Richard Posner, argue that when an emergency

172. Brief of Respondents at 19–21, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

173. Military Commissions Act of 2006 Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C. § 2241(e)).

174. *Nations Take Sides After Powell's Speech*, CNN.COM, Feb. 6, 2003, <http://www.cnn.com/2003/WORLD/meast/02/06/sprj.iq.powell.world.reax/index.html>.

175. *See Bush Sends Iraq War Letter to Congress*, CNN.COM, Mar. 19, 2003, <http://www.cnn.com/2003/ALLPOLITICS/03/19/sprj.iq.bush/index.html>.

176. CAN. COMM'N REPORT, *supra* note 140, at 154, 184.

177. Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A2.

arises, “cases involving a clash between liberty and safety cannot yet be governed by rules.”¹⁷⁸ The new terrain created by the September 11 attacks, they argue, makes it more sensible for both the executive and the courts “to govern by standard,” allowing decision makers to employ ad hoc balancing to reach a more optimal, flexible balance between the protection of liberty and the requirements of security—at least until they gain more experience dealing with the new terrorist threat.¹⁷⁹ Accurate balancing requires decision makers to accept less certainty in this new situation than the legal rules require and to pay more attention to an evaluation of the competing risks involved.¹⁸⁰

The argument that the post-9/11 threat requires us to jettison the legal principles that have hitherto been deemed essential to constitutional and international law inevitably starts with the claim that we now face a novel situation which represents a dramatic departure from the context of past emergencies or crisis. President Bush has argued that we have entered a “new world,”¹⁸¹ that “we face a threat with no precedent,”¹⁸² and that the war against terrorism has ushered in a new paradigm which requires “new thinking.”¹⁸³ In the aftermath of the September 11 attacks, government officials, judges, the media, and academics emphasized this “new paradigm” confronting the United States.¹⁸⁴

The mentality that we have entered a “new era,” and must adopt a “new paradigm,” because “everything has changed” may hinder reasonable balancing of liberty and security. First, the perception of a new, unprecedented situation leads to the belief that historical experience and lessons—often encapsulated in legal rules—now can be safely ignored. Posner argues that the civil libertarians are fundamentally misguided “in their assumption that the past is a good guide to the fu-

178. POSNER, *supra* note 25, at 34.

179. *Id.*

180. *Id.*

181. NATIONAL SECURITY STRATEGY, *supra* note 7, at 4.

182. West Point, New York, 1 PUB. PAPERS 917, 919 (June 1, 2002).

183. Memorandum from George W. Bush, *supra* note 67, at 134.

184. See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2830 n.6 (Thomas, J., dissenting); Memorandum from Alberto R. Gonzalez to the President (Jan. 25, 2002), reprinted in THE TORTURE PAPERS, *supra* note 66, at 118, 119 (“In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners”); see also Memorandum from George W. Bush, *supra* note 67, at 134 (“[The] new paradigm . . . requires new thinking in the law of war”).

ture The past does not include attacks on the United States by terrorists wielding nuclear bombs [or] dirty bombs . . . [T]he future may well include such attacks.”¹⁸⁵ Posner also surmises that civil libertarians “are looking backward rather than forward.”¹⁸⁶ History, according to Posner, is irrelevant.¹⁸⁷

Likewise, the administration’s argument for preventive war asserts that past experience, as encapsulated in the norms of international law, is not a relevant guide for balancing the interests of world peace and national security in the post-9/11 world.¹⁸⁸ The administration believes that this new threat “without precedent” makes our historical rejection of preventive war doctrine irrelevant to the present situation.¹⁸⁹

The legal rules that preclude preventive war, “preventive” torture, and indefinite and prolonged preventive detention all encapsulate the bitter lessons of historical experience. The sordid American experience with preventive detention in the twentieth century suggests that generally such detentions neither safeguard security nor ensure our liberty.¹⁹⁰ It is obvious in hindsight that these disastrous experiences with preventive detention were unnecessary to protect security; and even at the time, some informed observers argued that the policies were flawed and unnecessary. None other than FBI Director J. Edgar Hoover, a man not generally known as a civil libertarian,¹⁹¹ argued against the Japanese internment camps, claiming that the FBI had sufficient capacity using traditional law enforcement surveillance to ferret out and charge any potential Japanese American saboteurs and spies.¹⁹²

Just as the domestic use of preventive detention to preempt perceived threats has a troubled history, the use of preventive war to preempt new dangers before they occur has often had calamitous consequences. The history of western

185. POSNER, *supra* note 25, at 47.

186. *Id.*

187. *Cf. id.* at 51 (rejecting the tendency of civil libertarians to “narrate a history of civil liberties violations”).

188. *See* Yoo, *supra* note 25, at 734–36 (describing how the administration’s preemptive actions violate international law).

189. *See supra* text accompanying notes 181–84.

190. *See* Cole, *supra* note 27, at 990–97.

191. *See* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 274 (1973).

192. *See* 117 CONG. REC. H31551–52 (daily ed. Sept. 13, 1971) (statement of Rep. Railsback), *quoted in* Padilla v. Rumsfeld, 352 F.3d 695, 719–20 (2d Cir. 2003), *rev’d*, 542 U.S. 426 (2004).

civilization is filled with major wars commenced for preventive reasons: Sparta's declaration of war against Athens commencing the Peloponnesian War,¹⁹³ Carthage's preemptive attack on Rome,¹⁹⁴ the preventive war Germany declared against Russia that initiated World War I,¹⁹⁵ and Japan's surprise attack on the American fleet at Pearl Harbor,¹⁹⁶ to name just a few of the more notable examples. As political scientist David Hendrickson observes, "Repugnance for preventive war became deeply embedded in the world community because the use of that doctrine in the twentieth century led to results nearly fatal to civilization."¹⁹⁷

The generally disastrous history of preventive war is not confined to the twentieth century. According to one study, virtually all of the major wars in Europe between the sixteenth and twentieth centuries were motivated by prevention; typically a powerful but declining state "engaged in a desperate race against time"¹⁹⁸ to defeat a growing new danger which, it perceived, would inevitably overwhelm it.¹⁹⁹ Another study concludes that between 1848 and 1918, "[e]very war between Great Powers . . . started as a preventive war, not as a war of conquest."²⁰⁰ All but one "brought disaster on their originators."²⁰¹ Yet another analysis of centuries of European warfare finds that "[p]reventive logic . . . is a ubiquitous motive for war."²⁰² In 1760, Edmund Burke concluded that the military policy of preventing emerging new threats to the balance of power had been the source "of innumerable and fruitless wars" in Europe.²⁰³ One prominent scholar of the history of warfare concluded after

193. DALE C. COPELAND, *THE ORIGINS OF MAJOR WAR* 210–11 (2000).

194. *See id.* at 211–13.

195. *See id.* at 82–85.

196. *See* Nobutaka Ike, *Introduction* to JAPAN'S DECISION FOR WAR, at xiii, xxiv (Nobutaka Ike ed., 1967) ("By the fall of 1941, the Japanese leaders . . . had come to believe that they were being pushed into a corner by the United States and her allies. . . . [N]o course but war seemed possible to the Japanese.").

197. David C. Hendrickson, *Imperialism Versus Internationalism: The United States and World Order*, GAIKO FORUM, Fall 2002, at 35, 36.

198. COPELAND, *supra* note 193, at 220.

199. *See id.* at 214–34.

200. A.J.P. TAYLOR, *THE STRUGGLE FOR MASTERY OF EUROPE 1848–1918*, at 166 (1954).

201. *Id.*

202. STEPHEN VAN EVERA, *CAUSES OF WAR: POWER AND THE ROOTS OF CONFLICT* 76 (1999).

203. MICHAEL WALZER, *JUST AND UNJUST WARS* 76 (1977).

an exhaustive study that the “chief source of insecurity in Europe since medieval times . . . lies in [nations’] own tendency to exaggerate the dangers they face, and to respond with counterproductive belligerence.”²⁰⁴ Another scholar of warfare, Columbia Professor Robert Jervis, surveyed the historical record and concluded that, “[o]n balance, it seems that states are more likely to overestimate the hostility of others than to underestimate it.”²⁰⁵

The argument that we should abandon the rules restricting the use of coercive preventive measures because we are now facing a new world with terrorists capable of possessing and using weapons of mass destruction ignores the fact that these rules emerged, at least in part, from our experience addressing perceived new and dangerous threats. States have often argued that the threat they faced was new or unprecedented to justify uses of coercive preventive measures.²⁰⁶ These arguments date back to ancient times, when Spartans debated whether to launch the disastrous Peloponnesian War because of the “completely different” threat from Athens.²⁰⁷

Similarly, the development of atomic weapons created a new, unprecedented threat after World War II that led many Americans to advocate preventive war, arguing that the Soviet nuclear threat created a fundamentally new international environment in which the normal rules could no longer apply.²⁰⁸ Fortunately, American leaders from Truman to Kennedy rejected these arguments.²⁰⁹ So too the experience with the World War II roundup of Japanese Americans was justified as a response to a very real, brand new, and qualitatively different threat: the first significant attack by a foreign power on U.S. soil in over a century, and the first to use the new technology of air power capable of striking the United States in a fraction of the time foreseen by the framers.²¹⁰ Congress enacted the Non-Detention Act of 1971 to ensure that such preventive deten-

204. VAN EVERA, *supra* note 202, at 192.

205. Robert Jervis, *War & Misperception*, 18 J. INTERDISC. HIST. 675, 688 (1988).

206. See, e.g., COPELAND, *supra* note 193, at 71; JAMES JOLL, *THE ORIGINS OF THE FIRST WORLD WAR* 87 (1984).

207. THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 75 (1972).

208. See COPELAND, *supra* note 193, at 171; Marc Trachtenberg, *A “Wasting Asset”: American Strategy and the Shifting Nuclear Balance*, INT’L SECURITY, Winter 1988–99, at 5, 8–11.

209. See COPELAND, *supra* note 193, at 173–74.

210. See DERSHOWITZ, *supra* note 5, at 111–14.

tions of U.S. citizens would not occur in response to any future real or imagined new threat.²¹¹ In short, new threats, a changed world, and new paradigms are nothing new, and the rules of law reflect the lessons of our experience in responding to such new threats.

While this history cannot definitively prove that preventive war and preventive detention are always counterproductive, it certainly suggests that we ought to be cautious about replacing the relatively clear rules of law with the ad hoc balancing test of the coercive preventive paradigm. Modern social science research also demonstrates the need for skepticism about assertions that the threat of a catastrophic attack requires that we abandon rules limiting government discretion and adopt a pure cost-benefit balancing test.²¹² If as a rule, people rationally calculate the risk of catastrophic harm and counterbalance the risk of using coercive preventive measures mistakenly, we might be able to discard the bright-line rules that guard against emotional and irrational decision making.²¹³ But it makes little sense to do so if emotion typically prompts people to exaggerate the risk of catastrophic harm, and therefore to tolerate many more false positives than any rational calculation would permit.²¹⁴ In addition, engaging in ad hoc balancing in emotionally laden crisis situations is likely to undervalue the potential costs of coercive preventive action, because people tend to consider only the short term, highly vivid and accessible costs, while ignoring the dangers that are more abstract.²¹⁵

211. Pub. L. No. 92-128, 85 Stat. 347 (codified as amended at 18 U.S.C. § 4001(a) (2000)); *see also* H.R. REP. NO. 92-116, at 2 (1971).

212. *See* CASS R. SUNSTEIN, LAWS OF FEAR 105 (2005) (“[W]orst-case scenarios have a distorting effect on human judgment, often producing excessive fear about unlikely events. . . . The result is a situation in which people often show baseless fear . . .”).

213. *Cf.* RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 139–40 (2004) (arguing that cost-benefit analysis is an important step in assessing catastrophic risk).

214. *Cf.* Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045, 1082 (2005) (“[C]ontrary to the intuitive perspective reached by many academics and policymakers, careful deliberative process is most important in deciding to go to war or responding to international threats precisely at those times when it is most likely to be discarded.”).

215. *See id.* at 1073 (“[E]mote control typically produces an overreaction to . . . problems . . . that are vividly described and easy to visualize.”); *cf.* JEFFREY ROSEN, THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE 74 (2004) (“People believe that they are most likely to be victimized by the threats of which they are most afraid.”); Cass R. Sunstein, *Terrorism*

Widespread preventive detention without adequate safeguards, for example, creates numerous risks generally: some detainees will be radicalized by their treatment and will become terrorist sympathizers, the Arab and Muslim communities in the United States will grow distrustful and be less likely to cooperate in tracking down terrorists, and al Qaeda will use our actions to recruit more terrorists.²¹⁶ If one could rationally calculate the total costs, one might find out that such preventive detention may very well increase the risk of a terrorist attack instead of reducing it.

Psychological studies highlight the difficulties in rationally balancing these costs and benefits. Decision making is often based on emotive, affect-based mental processes, which tend to diverge from rational cognitive assessments of risk.²¹⁷ When faced with a potential catastrophe that has a small chance of eventuating, people tend either to ignore the risk or to exaggerate it.²¹⁸ At times, to be sure, we may discount risks that would warrant more forceful action.²¹⁹ Particularly where worst case scenarios evoke vivid, emotion-laden images of recent events, however, people are much more likely to overreact.²²⁰ As University of Chicago Professor Cass Sunstein has noted, “worst-case scenarios have a distorting effect on human judgment, often producing excessive fear about unlikely events.”²²¹

Three phenomena particularly distort the rational cost-balancing equation proposed by the preventive paradigm. The first is that humans react more emotionally to perceived new situations than to things they have already experienced.²²² Our affective systems are much more sensitive to situations that appear to be new, but they adapt readily to ongoing or repeated

and *Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 127–28 (2003) (“[T]he word ‘terrorism’ evokes vivid images of a disaster . . .”).

216. COLE, *supra* note 82, at 183–87.

217. See George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 269 (2001) (describing the “divergence of emotional responses from cognitive evaluation of risks”).

218. POSNER, *supra* note 213, at 248.

219. See, e.g., *id.* at 249 (“There is no historical memory of asteroids colliding with the earth and so we find it hard to take the threat of such collisions seriously even if we accept that it exists.”).

220. See Lobel & Loewenstein, *supra* note 214, at 1070 (“The problem of vivid, emotional miscalculation of risk is particularly acute in the antiterrorism context, since fear is a particularly strong emotion . . .”).

221. SUNSTEIN, *supra* note 212, at 105.

222. See Lobel & Loewenstein, *supra* note 214, at 1056–57.

stimuli.²²³ In contrast, the deliberative system is much more aligned to “ongoing, stable situations.”²²⁴ As a result, when we face what is widely perceived to be a new, qualitatively different terrorist threat—as occurred after September 11—we are much more likely to emotionally overreact rather than rationally balance costs and benefits.

Second, emotions are highly attuned to visual imagery; such images skew cost-benefit balancing.²²⁵ Terrorist incidents are likely to prompt what Sunstein terms “probability neglect,” the tendency to overreact to small risks of catastrophic harms.²²⁶ The aftermath of the September 11 attacks demonstrated the propensity of emotions that are activated by an immediate, vivid, and potentially catastrophic situation to exaggerate risks. A study conducted a few weeks after 9/11 found that the average person believed that he or she faced a twenty percent chance of being personally hurt in a terrorist attack within the next year.²²⁷ This risk perception was seriously exaggerated. Indeed, individuals would not have faced that high a risk even if a terrorist attack of the same magnitude as the 9/11 attacks took place every day for an entire year.²²⁸

Similarly, when people were asked how much they would pay for flight insurance to cover losses resulting from terrorism, they agreed to pay more than when asked what they would pay for flight insurance to cover losses from all causes.²²⁹ This patently irrational result can be explained by the fact that asking about terrorism evokes vivid images of disaster, leading people to overestimate the risk.²³⁰ Canadians, cognizant of recent vivid examples of persons afflicted with the Severe Acute Respiratory Syndrome virus in their country, evaluated their risk of contracting the disease as much higher than did Americans, despite the fact that citizens of both nations faced statistically similar risks.²³¹ In short, when vivid visual images trig-

223. *See id.*

224. *Id.*

225. *See* SUNSTEIN, *supra* note 212, at 81 (“[V]isualization or imagery matters a great deal to people’s reactions to risks.”).

226. *See id.* at 64–65.

227. ROSEN, *supra* note 215, at 73.

228. *Id.* at 74.

229. Eric J. Johnson et al., *Framing, Probability Distortions and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 39–42 (1993).

230. SUNSTEIN, *supra* note 212, at 40.

231. *See* Neal Feigenson et al., *Perceptions of Terrorism and Disease Risks: A Cross-National Comparison*, 69 MO. L. REV. 991, 995, 999 (2004).

ger strong emotions, people tend to overestimate the danger of small, disastrous risks.²³² As Sunstein argues,

In the context of terrorism, the implication is clear. The risks associated with terrorist attacks are highly likely to trigger strong emotions, in part because of the sheer vividness of the bad outcome and the associated levels of outrage and fear. It follows that even if the likelihood of an attack is extremely low, people will be willing to pay a great deal to avoid it.²³³

Studies confirm that people will overestimate the risk of danger when their emotions are triggered. In one study, people were informed that radon and nuclear waste in the foundation of their homes presented similar risks of cancer, but they reported an exaggerated risk with respect to the nuclear waste because they were angry about the source of the threat.²³⁴ In another study, people repeatedly judged the risks of an activity based on whether they had positive or negative feelings about it, irrespective of its actual risk.²³⁵ When they felt positive about an activity, they interpreted its risks as low and its benefits as high.²³⁶ If they felt negative about the activity, they judged its risks as high and its benefits as low.²³⁷ In fact, risk and benefit are often positively correlated.²³⁸ Many risky activities have substantial benefits and many activities that are not risky at all have virtually no benefit, but people routinely substitute their feelings about an activity for a rational calculation of its risks and benefits.²³⁹

These studies suggest that emotional issues such as terrorism will inevitably skew policymakers' application of ad hoc analysis based on worst-case scenarios. Individuals and political leaders will be unable to rationally assess the dangers and benefits of coercive preventive policies. Moreover, to the extent that the costs of these policies tend to be borne in the future,

232. See SUNSTEIN, *supra* note 212, at 81; Loewenstein et al., *supra* note 217, at 275–76.

233. Sunstein, *supra* note 215, at 124.

234. Peter M. Sandman et al., *Communications to Reduce Risk Underestimation and Overestimation*, 3 RISK DECISION & POL'Y 93, 106–07 (1998).

235. Paul Slovic, *What's Fear Got to Do with It? It's Affect We Need to Worry About*, 69 MO. L. REV. 971, 977 (2004).

236. *Id.*

237. *Id.*

238. *Id.* at 976–77.

239. See *id.* See generally Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS & BIASES 397, 400–01 (Thomas Gilovich et al. eds., 2002) (describing studies that demonstrated the impact of affect over costs and benefits in behavior).

and are intangible and abstract—such as the costs associated with undermining the rule of law—those costs will be undervalued.²⁴⁰ The resulting cost-benefit analysis will inevitably be distorted in favor of taking coercive preventive action, even when rational consideration demonstrates that the costs outweigh the benefits.

Of course, government officials do not always overestimate threats and risks in times of crisis. Indeed, social science posits that where a threat has no new vivid, visual example, people tend to ignore it.²⁴¹ Global warming and the rise of fascism in Germany are historical examples of that tendency.²⁴² However, where there is a visually vivid, outrageous, and immediate threat, decision makers generally overreact to the detriment of both liberty and security.²⁴³

Third, and potentially even more problematic, the risks posed by terrorist threats are often not quantifiable at all. Insurance experts and psychologists distinguish between “risk,” a probability that is capable of being estimated, and “uncertainty,” a probability that is unquantifiable.²⁴⁴ Terrorist threats generally fall in the latter category.²⁴⁵ Because of the difficulty of estimating risk of catastrophic harm, the private insurance market would not provide insurance against terrorism at reasonable rates.²⁴⁶ Consequently, Congress enacted the Terrorism Risk Insurance Act of 2002, which in effect requires the public to insure the insurers against calamitous losses from a terrorist attack.²⁴⁷

Cost-benefit advocates such as Posner and Yoo recognize that cost-benefit analysis in this context is purely subjective. Posner admits that in the present setting “risks and harms

240. See Lobel & Loewenstein, *supra* note 214, at 1082.

241. See POSNER, *supra* note 213, at 247–49 (describing how familiar threats like nuclear weapons are feared, while risks of unknown calamities like asteroid collisions are ignored).

242. See *id.*; RECORD, *supra* note 52, at 80.

243. See SUNSTEIN, *supra* note 212, at 81.

244. Michelle E. Boardman, *Knowing Unknowns: The Illusion of Terrorism Insurance*, 93 GEO. L.J. 783, 784 (2005).

245. *Id.* (describing the risk of terrorism as “fundamentally incalculable,” and discouraging insurers from issuing terrorism insurance).

246. See *A Safety Solution: Terrorism Insurance Program Spreads Risk Around*, PITTSBURGH POST-GAZETTE, Sept. 13, 2005, at E8.

247. Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified in scattered sections of 15 U.S.C.).

cannot be measured,”²⁴⁸ and that assessing the relevant needs and dangers of preventive detention is a subjective process that “requires a weighing of imponderables.”²⁴⁹ Ironically, Yoo admits the difficulties of balancing costs and benefits in his critique of the *Hamdi* plurality’s reliance on the *Mathews v. Eldridge* balancing test²⁵⁰ to weigh the citizen’s interest to be free from involuntary confinement against the government’s national security interest.²⁵¹ Yoo argues that “[i]t is difficult to understand how the *Mathews* test can be applied with any serious coherence.”²⁵²

Should a court gauge the government’s interest in protecting the national security by multiplying the number of lives potentially saved by the reduction in the probability of an attack—factoring in the uniform value of a life as measured by the Environmental Protection Agency? And how should the government measure the individual liberty interest in not being detained—as the average price that an average citizen would pay per hour to avoid detention? If these efforts to monetize the prongs of the *Mathews* test seem silly, it may be because there is no systematic, rational way to quantify these competing values.²⁵³

But if judges cannot rationally weigh these competing interests, why should executive officials be able to do so? Yoo’s argument proves too much: it suggests that the elaborate balancing facade of the preventive paradigm really masks emotional decision making based on fears, hunches, and intuitions, rather than costs and benefits.

This critique of the use of ad hoc balancing to decide whether coercive preventive measures are warranted prompts several objections. First, virtually all legal rules involve some sort of balancing, and therefore one cannot escape the problem of attempting to balance competing values and costs simply by relying on purportedly clear rules. There are almost always exceptions to the supposed clear rules, and whether the exceptions should apply in any particular case requires the decision maker to balance competing interests and costs.

While it is true that legal decision making generally involves some sort of balancing, the existence of fairly clear rules and the need to present objective evidence provide checks, re-

248. POSNER, *supra* note 25, at 41.

249. *Id.* at 66.

250. 424 U.S. 319, 335 (1976).

251. See John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 587–89 (2006).

252. *Id.* at 588.

253. *Id.* at 588–89.

straints, and presumptions to guide our decisions. Law cannot rid us of our predispositions, emotional biases, or our exaggerated fears, but adopting and attempting to follow clear rules can provide a counterbalance to these emotional reactions. In that sense, legal rules help us balance correctly, by imposing a test which reflects a balance articulated by our deliberative processes before a crisis hits for one more likely to be influenced by emotional reactions in the immediate aftermath of a crisis.²⁵⁴ Ironically, the need for clear legal rules is greatest precisely when the crisis seems to demand discarding them.²⁵⁵

For example, the rule that only the Security Council, and not individual or ad hoc groups of nations, can launch or authorize preventive wars does not absolutely remove the need for balancing a particular threat against the dangers of warfare. The rule does, however, reflect a strong substantive presumption that such wars are undesirable, and it imposes the procedural check that the decision be made by an international body composed of countries which may have a less emotional stake in going to war.²⁵⁶ Similarly, the absolute prohibition against torture may not prevent a military officer from disobeying the law and torturing a prisoner if he strongly believes that thousands of lives are imminently threatened by a ticking bomb and can be saved by coercive interrogation. This type of balancing, however, must be informed by the fact that the officer is acting unlawfully and is subject to criminal prosecution for his actions. That the criminal law imposes a serious penalty for faulty balancing will presumably act as a substantial restraint on the officer. In contrast, ad hoc balancing under vague standards imposes virtually no legal restraints on decision makers.

Another objection to maintaining clear rules during crisis concedes that exaggerated fears during a crisis may skew decision making, but argues that nonetheless the elevated risk of harm warrants a modification of the legal rules that apply in non-emergency periods. That people may have an exaggerated, emotional response to a new threat does not necessarily mean

254. See SUNSTEIN, *supra* note 212, at 105–106.

255. See *id.*

256. See U.N. Charter art. 51 (permitting individual nations to act in self-defense in response to an armed attack); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 16 (2002) (describing the UN prohibition on the use of force).

that the new threat does not create new risks which justify changing the status quo.

I do not argue that emergencies never require reevaluating or modifying legal rules to meet new situations; I merely contend that we should not abandon legal rules for ad hoc decision making whenever a new crisis hits. Of course we should always evaluate the legal rules in the context of a complex and changing environment. For example, prior to September 11, international law did not clearly define non-state terrorist attacks as armed attacks that would accord the victim state a right of self-defense.²⁵⁷ After September 11, NATO unequivocally, and the UN Security Council more ambiguously recognized such a right of self-defense.²⁵⁸ A new threat may require some modification of the legal rules, but policymakers should avoid discarding the relevant legal rules in favor of ambiguous standards and ad hoc balancing tests simply because we face a new crisis.

Second, despite the increased risk of harm in times of emergency, we should be skeptical about proposals made in the heat of crisis to significantly modify the rules developed prior to the crisis. Many of the existing rules were not developed simply for “normal” times but were explicitly based on experience with past crises and with prior arguments that new conditions required coercive measures. For example, Congress enacted the Non-Detention Act of 1971 prohibiting preventive detention of U.S. citizens unless explicitly authorized by congressional statute because it wanted to ensure that what happened to Japanese American citizens during World War II would not occur in any future war.²⁵⁹ Congress enacted the law to deal with wartime and other national emergency conditions because it concluded—based on historical experience—that despite the increased dangers of wartime, executive preventive detention was not warranted unless explicitly authorized by Congress.²⁶⁰ We should not discard that calculation simply because we are now experiencing dangers that differ from those we have faced in the past. Shouldn’t we trust the balance that Congress thought should apply in wartime when it studied the problem in a non-

257. See Drumbl, *supra* note 256, at 26–33.

258. See S.C. Res. 1368, ¶ 4, U.N. Doc. S/RES/1368 (Sept. 12, 2001); Press Release, North Atlantic Treaty Organisation, Statement by the North Atlantic Council (Sept. 12, 2001), *available at* <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

259. See H.R. REP. NO. 92-116, at 2 (1971).

260. *Id.* at 3–5.

crisis situation, rather than the balance which seems to make sense in the immediate and emotional aftermath of the crisis? At a minimum, we should be skeptical of claims to modify protections intended to apply in wartime, simply because there is a new wartime crisis. So too, the international community and U.S. Senate concluded that torture and cruel and inhumane treatment could never be justified—even during wartime and emergencies.²⁶¹ We should not discard or modify that legal principle, even if the risk of harm is now greater because of the September 11 attacks, because countries dispassionately and explicitly considered the elevated risk of harm during war and emergency when they drafted and ratified the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention against Torture. None of those treaties permit torture in times of war or emergency, even though their drafters undoubtedly recognized that in such situations, the necessity to obtain information would be much greater than in peacetime or non-emergency periods. We should not modify that rule because decision makers might reach a different judgment in the immediate emotional aftermath of a crisis; both history and social science ought to make us suspicious of judgments reached in crisis situations that are so fundamentally at odds with the rules people thought ought apply to war-time situations before the crisis eventuated.

There are, of course, occasions when it is appropriate for the government to take strong, coercive measures. But in almost all of these situations the law permits the government to take forceful action. For example, Condoleezza Rice and Donald Rumsfeld maintain that “millions are dead because Britain and France failed to take preventive military action to thwart the gathering Nazi threat in the 1930s.”²⁶² But at that time, legal rules permitted those countries to take military action that would have stopped Hitler before he could have obtained the military power he did. When Hitler attacked the Rhineland, Austria, or Czechoslovakia, Britain and France could have responded in collective self-defense to those attacks without the need to resort to any doctrine of preventive war. What prevented them from doing so was not international law, but rather the lack of political will to prepare militarily and forge a strong alliance with the Soviet Union to counter Hitler’s at-

261. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 65, art. 2.

262. RECORD, *supra* note 52, at 79–80.

tacks.²⁶³ Indeed, Winston Churchill unsuccessfully advocated the formation of a strong defensive alliance with the Soviet Union and military preparation, and not the initiation of preventive war with Germany.²⁶⁴

Of course, there are hypothetical situations where policy-makers may deem coercive preventive measures necessary to prevent catastrophic harm—as in torture and the ticking bomb scenario—but the legal rules simply prohibit executive officials from taking such action. However, real cases that present these dilemmas are likely to be rare, and as I and other scholars have written, it is better to force the executive official to violate the law openly and seek either indemnification or ratification, or accept punishment for his actions, than to permit officials to have the legal authority to engage in torture, preventive detention, and preventive war whenever they deem these measures necessary.²⁶⁵ To provide officials with the legal authority to take such measures when, in their opinion, emergency so requires is to take us down the path to normalizing those measures.

CONCLUSION

It is not surprising that governments often respond to an emergency or crisis by resorting to coercive preventive measures. When a danger becomes potentially catastrophic, it seems to make sense to take strong, aggressive preventive measures to avoid the danger from eventuating. Similarly, the tendency of governments to substitute ad hoc balancing for clear rules in determining which actions to take to resolve a crisis is not irrational. Discarding the clear rules affords government officials more discretion to take the preventive measures they deem necessary to meet the crisis.

Yet ironically, the turn toward coercive preventive measures may heighten instead of diminish the risk of the catastrophic danger occurring. In the heat of the crisis, the government will often fail to accurately consider the risks of the preventive

263. See *id.* at 79.

264. TUVIA BEN-MOSHE, CHURCHILL: STRATEGY AND HISTORY 108–09 (1992); A.J.P. TAYLOR, CHURCHILL, FOUR FACES AND THE MAN 28–31 (1969); ALFRED VAGTS, DEFENSE AND DIPLOMACY 311 (1956).

265. See, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1022–23 (2003); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1396–97 (1989).

action—risks that not only will imprison innocent people unnecessarily, but that these preventive measures will induce a reaction that will threaten the very security interests the government seeks to protect.

The Iraq war presents a vivid illustration of these dangers. A war that was waged ostensibly to prevent terrorists from obtaining access to weapons of mass destruction has created a terrorist haven in Iraq where none existed before the war.²⁶⁶ The war has spawned a breeding ground for terrorists in Iraq, inspired more terrorists throughout the world, embroiled the U.S. Armed Forces in a seemingly unwinnable conflict, and emboldened other nations such as North Korea and Iran to accelerate their efforts to produce nuclear weapons.²⁶⁷ An April 2006 classified National Intelligence Estimate concluded that the Iraq war “has made the overall terrorism problem worse.”²⁶⁸ Similarly a report by Britain’s top intelligence and law enforcement officials concluded that “[e]vents in Iraq are continuing to act as motivation and a focus of a range of terrorist related activity in the U.K.”²⁶⁹

The Iraq war as well as the other coercive preventive measures the Bush administration has employed in its war on terrorism thus stand as a cautionary note to those who seek to rely on ad hoc balancing of competing interests instead of clear rules to decide to preventively detain individuals, to preventively use coercive interrogation methods to gain information, or to wage preventive war against other nations. Such preventive actions are often justly condemned by civil libertarians as undermining our liberty and other values such as peace. Unfortunately, their use can often undermine our security as well.

266. Jessica Stern, *How America Created a Terrorist Haven*, N.Y. TIMES, Aug. 20, 2003, at A21.

267. COLE & LOBEL, *supra* note 1 (manuscript at 175–84).

268. Mark Mazzetti, *Spy Agencies Say Iraq War Worsens Terrorism Threat*, N.Y. TIMES, Sept. 24, 2006, at A1.

269. Elaine Sciolino & Don Van Natta Jr., *June Report Led Britain to Lower Its Terror Alert*, N.Y. TIMES, July 19, 2005, at A1.